Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 86-452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

C. K. DIXON, JR.

Petitioner,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PHILLIP D. SCOTT

GREENEBAUM DOLL & MCDONALD
1400 Vine Center Tower
P. O. Box 1808
Lexington, Kentucky 40593-1808
(606) 231-8500

Counsel for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

The Respondent elects to state the issues presented by the Petition For Writ of Certiorari as follows:

I. Whether the district court's refusal to accept the jury's finding constitutes reversible error pursuant to the provisions of Rule 50(b) of the Federal Rules of Civil Procedure and applicable case law construing that rule.

II. Whether the United States Court of Appeals for the Sixth Circuit erroneously applied 12 U.S.C. § 1823(e) in affirming the district court's judgment.

CORPORATE AFFILIATION

Respondent is a corporation created by Congress pursuant to 12 U.S.C. § 1811, and, accordingly, Respondent does not have any parent, subsidiaries or affiliates requiring disclosure pursuant to Sup. Ct. R. 28.1.

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RULES AND STATUTORY PROVISIONS

The text of the following rules and statutes are set forth in the Appendix hereto:

Fed. R. Civ. P. 50(b) ..... 1a.
Fed. R. Civ. P. 58 ..... 2a.
Sup. Ct. R. 17.1 ..... 3a.
12 U.S.C. § 1823(e) ..... 4a.
Ky. Rev. Stat. § 355.3-606 ..... 5a.

STATEMENT OF THE CASE

Respondent adopts as its statement of the case the following facts, most of which are set forth in the

opinion of the United States Court of Appeals for the Sixth Circuit:

On February 24, 1978 Red Chief Coal, Inc. and its owners, G. C. Kincer, Richard Kincer, Albert Kincer, and C. K. Dixon ("Petitioner"), borrowed the sum of $272,500 from the Mission State Bank in Mission, Kansas. The collateral given for the loan was heavy equipment used for mining coal, and the owners, including Petitioner, were accommodation parties on the note. By the terms of the note, the debtors agreed to allow the bank to exchange or release the collateral without notice to the debtors, and without affecting their liability.[1]

The debtors defaulted on the note after making one payment and subsequent efforts by a bank representative, Robert Koester, to collect the debt were unavailing. After a meeting with the debtors at which Koester was unsuccessful in collecting the debt, a third party, Rodney Taylor, expressed an interest in obtaining the collateral securing the loan. Thereafter, the Kincers, Koester, and Taylor reached an agreement whereby Taylor and Bluston Mining Company

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[1] Notwithstanding any subsequent argument by Petitioner to the contrary, both the district court and the Sixth Circuit found Petitioner to have waived notice by virtue of this provision. *See* KRS 355.3-606. The Kentucky Commentary to this section provides, in relevant part, "[c]onsent may be given in advance, and is commonly incorporated in the instrument; or it may be given afterward. It requires no consideration, and operates as a waiver of the consenting party's right to claim his own discharge." Although Petitioner states that he set up "a number of defenses, any of which the jury may have believed operated to relieve him of the original obligation" (Petition, p. 21) this is simply not the case. This issue was fully briefed before the court of appeals which found Petitioner's argument to be without merit.

assumed $240,000 of the debtors' obligation in return for the collateral, and the principals of Red Chief, the three Kincers and Petitioner, were to divide the remaining liability on the original obligation. The original debtors *were not released from their obligation on the note*, except to the extent that payments were made on the obligation by Taylor and Bluston Mining Company.

The Kincers maintained at trial that, in order to persuade the debtors to agree to this transaction, Koester secretly promised that the debtors, including Petitioner, would be released from their liability on the note as well as their liability under the guaranty agreement given in connection with the promissory note executed by Taylor and Bluston Mining Company. Petitioner was not present at this meeting, nor did he sign any of the documents generated by the meeting. Conflicting testimony was presented at trial concerning whether Petitioner was subsequently given notice of the details of this meeting.

On August 8, 1980 the Mission State Bank failed and the Kansas State Bank Commissioner asked that Respondent be appointed receiver pursuant to 12 U.S.C. § 1821(e). Thereafter, certain assets were sold and certain liabilities were transferred to the Mission Bank. The remaining assets were then sold to Respondent in its corporate capacity, including the note executed by the debtors.

On January 27, 1982 Respondent filed a four-count complaint in the United States District Court for the Eastern District of Kentucky, Pikeville Division, seeking recovery against the debtors on the original note. The complaint also sought relief against Taylor and Bluston Mining on the Taylor note, against the Kin-

cers on their guaranty agreement of the Taylor note, and on the individual notes executed in conjunction with the Taylor note.

The Kincer defendants and Petitioner were called as witnesses during the presentation of the Respondent's case in the district court. In an effort to expedite the proceeding, the defendants' presented their case following cross-examination by Respondent's counsel (R. 2-45). At the conclusion of Respondent's case, all relevant evidence had been presented.

Following presentation of Respondent's case, both Respondent and Petitioner commenced their arguments on motions for a directed verdict in their favor (R. 2-183). After Petitioner's motion for a directed verdict was overruled, Petitioner was allowed to be recalled and brief testimony was presented which Petitioner's counsel deemed to be "rebuttal" (R. 2-195 to 2-198). Following this rebuttal, arguments on the motions for directed verdicts resumed (R. 2-200).

During Respondent's argument for a directed verdict, the district court raised the issue of whether Respondent stood in the position of a holder in due course of the original note (R. 2-220). This issue and the issue of the application of 12 U.S.C. § 1823(e) were subsequently argued by counsel and considered by the district court (R. 3-2 to 3-10). Respondent motion for a directed verdict was thereafter taken under advisement (R. 3-10). The case was then submitted to the jury by way of five special interrogatories. Based on the evidence presented, the jury found that the defendants owned nothing under the original promissory note; that the Kincers were liable under their guaranty agreement of the Taylor note; that the

Kincers were liable under the individual promissory notes; that the Kincers were fraudulently induced into executing the Taylor assumption transaction documents and; that the assumption transaction fully released all defendants from liability under the original promissory note. The district court declined to accept special interrogatory number five of the jury—that the assumption transaction had released the defendants from their liability.

After declining to accept the jury's finding, the district court entered a provisional judgment in favor of Respondent. Pursuant to the terms of this judgment, the parties were granted additional time to brief the application of 12 U.S.C. § 1823(e). Petitioner was unable to convince the Court that this section did not apply to the facts presented and, on July 24, 1984, a final judgment was entered in favor of Respondent. This judgment was affirmed by the court of appeals on April 29, 1986. Petitioner's motion for rehearing was denied on June 23, 1986.

ARGUMENT

I. Petitioner has failed to establish sufficient reason to invoke this Court's jurisdiction.

Petitioner has failed to establish or sufficiently allege any reason why this Court's jurisdiction should be invoked. Specifically, Petitioner has failed to show (i) that a conflict exists among the circuits on the issues presented; (ii) that the Sixth Circuit's decision or the decision of the district court so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervision; or (iii) that the Sixth Circuit resolved the issues presented by the Petition in a way in conflict

with applicable decisions of this Court. Accordingly, the Petition for Writ of Certiorari should be denied. *See* Sup. Ct. R. 17.1.

II. The decision of the Sixth Circuit is not in conflict with this Court's decision in *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952).

As set forth above, relying upon the provisions of 12 U.S.C. § 1823(e), the district court refused to accept the jury's finding that the parties to the original note had been released from liability under the note by virtue of a secret side agreement. Petitioner asserts that the actions of the district court in refusing to accept the jury's finding and its entry of a subsequent judgment in favor of Respondent is in conflict with this Court's holding in *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952). This assertion is clearly erroneous. In *Johnson* the plaintiff brought suit under the Jones Act in federal court for the wrongful death of her husband. After all evidence had been submitted, defendant moved for dismissal of the complaint and for a directed verdict on the ground that negligence had not been proven. The district court reserved its decision on these motions and submitted the case to the jury which returned a verdict of $20,000 for plaintiff. Thereafter, defendant orally moved the court to set the verdict aside on the grounds that it was excessive, contrary to law, contrary to the evidence and contrary to the weight of the evidence. Two months later, this motion and defendant's pre-verdict motions were denied. On appeal the Second Circuit reversed, holding that the defendant's motion for a directed verdict should have been granted.

Thereafter, this Court granted certiorari to review the single question of whether the court of appeals had the power to direct entry of judgment n.o.v. In a 5-4 decision, it was held that, in the absence of an express motion for judgment n.o.v., the court of appeals was powerless to direct entry of judgment for the defendant and could only have remanded the case for a new trial. Clearly, the limited holding of *Johnson* is inapplicable to the facts presented here as the Sixth Circuit correctly held.

In reaching its decision the Sixth Circuit carefully analyzed the holding of *Johnson* and its application to the facts presented. In relevant part, the court stated:

> The case before us is distinguishable from *Johnson*. First, the judgment n.o.v. in this case was granted by the trial court not by an appellate court. [Footnote in original omitted.] Second, and more significantly, we think, the case before us is distinguishable from *Johnson* because here the proceedings before the trial court constituted the essential equivalent of a motion and hearing for judgment notwithstanding the verdict. See *Warkentien v. Vondracek*, 633 F.2d 1, 2 n.1 (6th Cir. 1980).
>
> It is evident from the record that immediately upon announcement by the jury of its answers to the five special verdict questions, the trial court was aware that the jury's findings were contrary to the law and that a verdict entered in conformity with those findings would violate § 1823(e).

Rather than adjourn the proceedings and wait for plaintiff's counsel to prepare, file, serve, and notice for rehearing a written motion for judgment notwithstanding the verdict, the trial judge, unquestionably sensitive to the requirements of administrative and judicial efficiency dictated by a crushing backlog of trial court litigation, proceeded directly to address the issue before him: the unlawfulness of the jury's verdict.

. . .

From a reading of the lengthy colloquy between the court and counsel which followed the court's statement of intention to render for the plaintiffs, it is plain that all were aware that the court intended, unless dissuaded by the argument of defense counsel, to enter a judgment n.o.v. because the jury verdict was unlawful under § 1823(e). The colloquy was the essential equivalent of a hearing on a motion for judgment n.o.v.; the court asking rhetorically whether it wasn't clear that the provisions of § 1823(e) precluded, as a matter of law, the entry of a verdict in conformity with the jury's answers to the special verdict questions and required entry of a judgment notwithstanding that verdict for the plaintiff, and the defendant insisting that, on the facts, the statutory bar of § 1823(e) should not be controlling.

There is no question that the defense counsel was aware that it was the court's intention to enter a judgment notwithstanding the verdict, but one whose finality would

> be deferred for thirty days to afford defense counsel even further opportunity to consider the propriety of such action and to be heard on the matter. [Footnote in original omitted.]
>
> . . .
>
> . . . The Court's entry of a provisional judgment, following a lengthy colloquy concerning the substantive merits of the only basis upon which a judgment notwithstanding the verdict could be entertained, was the equivalent of requiring plaintiff's counsel to move for a judgment notwithstanding the verdict. At that point, there would have been no purpose served by requiring plaintiff to retire to his office in order to prepare and notice for rehearing a written motion for the relief counsel and the Court had considered at length and would, at defense counsel's election, consider once again within the ensuing thirty days.

Although the holding of *Johnson* has been criticized as an overtechnical application of the Federal Rules of Civil Procedure[2], it is not necessary for this Court reverse *Johnson* to uphold the decision of the court of appeals. The facts presented here are clearly distinguishable from those in *Johnson*. *See First Safe Deposit National Bank v. Western Union Tel. Co.*, 337 F.2d 743 (1st Cir. 1964) (upholding the district court's entry of judgment n.o.v. occurring within six days of

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[2] See dissenting opinion of Justice Frankfurter at 344 U.S. 54-64. *See also*, 38 Cornell Law Quarterly 449 (1953). 21 George Washington Law Review 818 (1953); 31 Texas Law Review 913 (1953); 6 Vanderbilt Law Review 791 (1953).

the verdict since the court could have asked the defendant to file an immediate Rule 50(b) motion and thereafter act upon it); *see also Shaw v. Edward Hines Lumber Co.*, 249 F.2d 434 (7th Cir. 1957) (distinguishing the holding of *Johnson* where the district court expressly reserves its ruling on a motion for directed verdict and allows the case to go to the jury with the intention of ruling on the motion subsequent to return of the verdict); *Warkentien v. Vondracek*, 633 F.2d 1 (6th Cir. 1980).

As the Seventh Circuit recognized in *Shaw, supra*, a sound basis exists for limiting the holding of *Johnson* to the specific issue there presented:

> " . . . [T]he rule [Rule 50, Fed. R. Civ. P.] does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion to choose between two alternatives. See Berry v. United States, 312 U.S. [450] 452, 453, 61 S.Ct. 637, 85 L.Ed. 945. And he can exercise this discretion with a free personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses. His appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted. Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart."

249 F.2d at 437-438 (quoting *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S., 212, 215-216 (1947)).

There is another compelling reason why the Sixth Circuit's decision must be upheld under the facts here presented. Rule 50(b) provides that "[n]ot later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict *and any judgment entered thereon* set aside . . . " (emphasis added). The term "judgment" as referred to in Rule 50 and defined in Rule 58, Fed. R. Civ. P., means a *final* judgment. *E.g., O. Hommel Company v. Ferro Corp., 659 F.2d 340, 353 (3d Cir. 1981), cert. denied*, 455 U.S. 1017, *reh'g denied*, 456 U.S. 965 (1982); *Philhall Corp. v. United States*, 546 F.2d 210 (6th Cir. 1976). In this case, a final, appealable judgment was not entered until July 24, 1984 *and that judgment was in favor of Respondent.* No purpose would be served to require Respondent to move for judgment n.o.v. following entry of this judgment.

Petitioner also asserts that "the Court of Appeals for the Sixth Circuit erred when they affirmed the decision of the United States District Court for the Eastern District of Kentucky, Pikeville Division, since judgment n.o.v. was entered by that court on a ground that was not included in a prior motion for directed verdict." (Petition, p. 18-19). This assertion is incorrect. The application of 12 U.S.C. § 1823(e) was specifically addressed by counsel for Respondent before the case was submitted to the jury (R. 3-2 to 3-10). With respect to this issue the Sixth Circuit stated "[d]efense counsel had been alerted to the argument that § 1823(e) may have been an obstacle to one of its defenses since the plaintiff moved for a directed

verdict on that ground at the close of all the proofs in the case."

III. The Sixth Circuit correctly applied 12 U.S.C. § 1823(e) in affirming the district court's judgment.

Petitioner asserted at trial that, since he was not present at the meeting occurring in June, 1980, he did not consent to the transfer of the collateral securing his in debtedness. Therefore, he argued that the transaction constituted a novation as to him. Both the district court and the court of appeals specifically rejected this argument. With respect to this issue the court of appeals stated:

> The *written agreement* between the bank, Taylor, Bluston Mining, and the Kincers *expressly preserves* the original parties' liability on the note. It is only by virtue of the claimed side agreement between the bank and the Kincers that the jury could have found that the assumption was intended to extinguish the liability of the original parties. Under § 1823(e), such an unwritten agreement is not valid against the F.D.I.C., since it diminishes the rights of the F.D.I.C. to the assets represented by the loan agreement. *Dixon's argument that the second loan constitutes a novation is without merit.* The language of the loan agreement states that it does not extinguish the original debtors' liability, thus it cannot be a novation. To show that the second agreement did extinguish the original liability, Dixon must interpose the side agreement between the bank and the Kincers. Section 1823(e) does not allow that unwritten

> agreement to be enforced against the F.D.I.C. (Emphasis added).

At trial, Petitioner was able to avoid entry of a directed verdict *only* by virtue of the defense of fraud raised by his co-defendants. This was based on the district court's reasoning that a release of the Kincer defendants due to fraud would also release the Petitioner, at least in part. Thus, in order for Petitioner to have prevailed at trial, the secret side agreement was a necessity. Simply stated, in order to avoid his liability under the original note, Petitioner was forced to rely on the Kincer's defense of fraud.

Petitioner also asserts that the written agreement between the bank, Taylor, Bluston Mining Company, and the Kincers met each of the four elements of 12 U.S.C. § 1823(e), and, therefore, could be used to "diminish or defeat the rights of the FDIC." This assertion is without factual basis. Due to the fact that Petitioner consented, in advance, to a transfer of the collateral in issue, the assertion is, in any case, of no consequence. KRS 355.3-606.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

PHILLIP D. SCOTT

GREENEBAUM DOLL & MCDONALD
1400 Vine Center Tower
P. O. Box 1808
Lexington, Kentucky 40593

Counsel For Respondent

APPENDIX

RULES AND STATUTORY PROVISIONS

Fed. R. Civ. P. 50(b):

> **Motion for Judgment Notwithstanding the Verdict.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

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Fed. R. Civ. P. 58:

ENTRY OF JUDGMENT

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain of costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Sup. Ct. R. 17.1:

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Title 12, United States Code, Section 1823(e):

> **Agreements against interests of Corporation.** No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

Kentucky Revised Statute, 355.3-606:

Impairment of Recourse or of Collateral

(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder

(a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest or notice of dishonor with respect to any such person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary; or

(b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

(2) By express reservation of rights against a party with right of recourse the holder preserves

(a) all his rights against such party as of the time when the instrument was originally due; and

(b) the right of the party to pay the instrument as of that time; and

(c) all rights of such party to recourse against others.